TESTIMONY
Before the Senate Committee on Foreign Relations
On the American Servicemen's Protection Act
By Professor Jeremy Rabkin, Cornell University

Thank you for inviting me to testify on the "American Servicemen's Protection Act." It is, I believe, a very important and timely response to some very disturbing trends in international politics.

The official title of this measure calls attention to one specific concern -- the threat that individual American military personnel will be placed on trial before the proposed International Court of Justice (ICC). I believe this concern is well-warranted. But I also believe this immediate concern needs to be seen in a wider context. What we should worry about is not simply a physical threat to our servicemen but a wider threat to our national sovereignty. In what follows, I will try to sketch the most worrisome aspects of what is now emerging as a broad trend in international law.

I will emphasize three main points: First, the ICC represents a dramatic departure from traditional principles of national sovereignty. Second, it comes at a time when principles of national sovereignty have already been dangerously eroded and the ICC will only reinforce this trend. Third, this trend will very likely serve to undermine the authority of democratic governments -- and the United States will be a particularly tempting target.

I. International prosecutions threaten national sovereignty

International law has been developing for many centuries. Major legal treatises have been published on the subject since the early 17th Century. Yet no one, until quite recently, has envisioned a reliable system of criminal justice that would be truly international.

Why not? Because criminal law is inherently coercive -- often quite intensively so. Contract disputes typically involve business firms that have some interest in demonstrating their trustworthiness. So many contract disputes are now submitted, quite voluntarily, to private arbitration. For centuries, merchants doing business across national borders have agreed to trust national courts to settle international contract disputes.

But criminals are, by definition, prepared to defy the law. So you cannot enforce criminal law without force or the credible threat of force. Who provides that force? The traditional answer was that every sovereign state must be responsible for enforcing law and order within its own territory. This ultimate authority to use force was understood as one of the distinctive attributes of a sovereign state.

The historic priority of international law was to reduce occasions for conflict among sovereign states. For the most part, it tried to do this by getting them to respect the sovereign rights of other states within their own territory. A state could enforce its criminal law on foreign citizens entering its own territory but it could not try to enforce its law on foreign citizens in some other territory.
Here, for example, is how a leading American treatise summarized the accepted international law doctrine at the end of World War II: "States are agreed that within the national domain, the will of the territorial sovereign is supreme. That will must, therefore, be exclusive. . . . " Accordingly, "a State cannot determine the lawfulness of occurrences in places outside of ... its control." (C.C. Hyde, *International Law, Chiefly as Interpreted and Applied by the United States*, 2d. ed., 1945, pp. 640, 726)

It is true that in the decades since then, many countries -- including the United States -- have claimed extra-territorial criminal jurisdiction for crimes committed against their own citizens or against their own fundamental security concerns. But such jurisdiction is hard to enforce and has not often been exercised because, among other things, it requires cooperation of other states or risks affronting other states when done unilaterally.

It is a big leap beyond such limited self-protective measures to the sort of jurisdiction envisaged for the ICC. Among other things, the Rome Statute would give the ICC the authority to prosecute government officials who violate the human rights of their own citizens. And the ICC would have the authority to do this, for signatory states, in any case where its independent prosecutor thinks justice has not been done -- even if the home state has conducted its own trial or issued its own pardons.

Every country vests a pardon power in executive officials, which is an acknowledgment that legal justice must sometimes be tempered by other considerations. We ended our own Civil War with a general amnesty for the rebels, even those responsible for murdering black soldiers in cold blood. Every country that has made a transition to democracy in the past decade -- a considerable list of states from South Africa to Latin America and Eastern Europe -- has issued broad amnesties for past abuses in order to conciliate previous opponents of democracy.

By contrast, the premise of the Rome Statute is that sovereign states can no longer be trusted to decide for themselves when and how to prosecute perpetrators of serious human rights violations in their own territories. Instead, the ultimate responsibility for such prosecutions will be vested in an international authority -- with no responsibility for the ultimate political consequences of its actions.

Nothing like this has been attempted before. The few exceptions that are commonly cited as precedents for this venture are exceptions that prove the rule. Germany and Japan did not consent to transfer jurisdiction over their war criminals to international tribunals. They had both surrendered unconditionally and it was the Allied victors who determined to impose these trials. The Allied powers, as the acting governmental authorities in Germany and Japan, did not surrender prosecutorial authority to some international bureaucrat. Allied governments made their own decisions about which criminals to prosecute and justice was not their only concern. So, to conciliate Japanese opinion, American authorities decided that the Emperor of Japan should not be tried as a war criminal. A few years after the first Nuremberg trials, American authorities also decided to cut back on planned prosecutions of lower level Nazis in Germany, as the advent of Cold War tensions made it seem more important to conciliate public opinion in western Germany. Meanwhile, the Allies were quite scrupulous in excluding themselves from the jurisdiction of the tribunals they imposed on their defeated enemies.

In Rwanda and the former Yugoslavia, the UN Security Council did impose war crimes tribunals for limited purposes -- but on territories that were so mired in chaos and civil war that they were not in much of a position to assert their own sovereignty. And in both cases, the Security Council (or the countries represented on it) did little to stop ongoing atrocities when they were occurring and then did little to help catch the perpetrators. These courts are little more than gestures and rather cheap gestures, at that.

Meanwhile, the European Union -- which has its own parliament and its own flag and a whole series of common institutions -- has not yet attempted to establish a European Criminal Court. Even countries that are unique in the world for their willingness to share sovereign powers with a regional authority have not been willing to share their criminal enforcement power. So we are to imagine that what has not been attempted in western Europe, even after decades of effort toward economic and political integregation, can now be effectively implemented over the whole world!

We are told that most countries in the world now support the Rome Statute and the requisite majority will soon ratify it. But countries have voted for all sorts of treaty measures without seriously intending to change their conduct. The ICC will have no army, no police, no real coercive force. It will depend on voluntary cooperation. Most signatories may assume their own nationals will never be prosecuted or that they can always refuse to turn them over to the ICC if a prosecution is attempted.

The ICC is certainly not going to impose its will on the most abusive governments -- any more than the International War Crimes Tribunal for the Former Yugoslavia has deterred Serbian President Milosevic from committing atrocities. At best, the ICC will be able to conduct a few symbolic prosecutions. Due process of some sort will be observed, but in the most literal sense these will be show trials -- to make a political point, in the absence of real authority to enforce a meaningful international standard.

Britain's arrest of Chile's former president, Augusto Pinochet, shows that even quite respectable democratic nations sometimes feel a yearning to mount show trials.

II. The larger context: Pinochet won't the last victim of ad hoc action

Human rights conventions have for decades asserted that countries are bound by international law in their treatment of their own citizens. But most human rights conventions have no serious enforcement power. A few criminal trials will not, by themselves, give force to international human rights standards. But they will certainly rivet international attention and give credibility to the idea that these standards are really "law."

Before the Pinochet case, however, such criminal prosecutions by outside countries were only taken seriously in the academic writings of a subset of international law scholars. These academics began to assert in the 1980s that there was an evolving customary law of human rights, which had established a "universal jurisdiction" for prosecution of human rights abuses. According to this theory, any country might try perpetrators of human rights abuses in other countries. Until the Pinochet case, this was a theory and not even a very plausible theory -- since it asserted a customary law based on almost no actual practice by governments.

The fact is that governments had been quite reluctant to prosecute top officials of other states. International law had previously been supposed to place top government officials in a separate category, because they were seen as the bearers of a special sovereign immunity or because their decisions, as sovereign acts, could not be questioned in the courts of other countries. The legal doctrines have exceptions and technical complexities. But the fact is that no country had dared to attempt the prosecution, in its own national courts, of a high official of another state for his official acts in his home state. The exceptions (such as Israel's trial of Nazi killer Adolf Eichmann or the U.S. trial of Panama's Manuel Noriega) took place in cases where the home country of the defendant did not object.

Pinochet was seized by British authorities in the summer of 1998, weeks after he entered the country on a diplomatic passport as part of a Chilean arms buying mission. The aim was to extradite Pinochet to Spain, where a magistrate sought to try him for "genocide" against Chilean leftists (some 3,000 of whom were killed in the aftermath of the military coup that brought Pinochet to power). After more than a year of legal wrangling, a panel of judges in Britain's House of Lords, its highest court, held that Britain did have the authority to extradite Pinochet, because Spain did have the

authority to put him on trial -- for abuses of his government against Chilean citizens in the territory of Chile.

As the Law Lords saw the case, Spain could assert jurisdiction for such a trial under the UN Convention Against Torture. The Convention says nothing about waiving immunity for top officials but the majority of the British judges held that the waiver could be read into the text, given larger trends in international law. The Torture Convention defines torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted ...." By that very vague standard almost every government in the world has probably committed some acts of "torture" and the convention does not limit its reach to dictatorships or to especially violent regimes.

Even in the Pinochet case, the House of Lords insisted, with curious legal fastidiousness, that Pinochet could only be tried for offenses committed in the last months of his rule (after Britain and Chile had ratified the torture convention) and in that brief period there were only a handful of documented abuses. It was, according to British judges, of no relevance that Pinochet submitted to a democratic referendum on his continued rule and voluntarily submitted to a peaceful transition to democratic rule in 1990. It was of no relevance that in almost a decade thereafter, the freely elected government of Chile had declined to question an amnesty protecting Pinochet from prosecution there. The standard for international prosecutions, according to British judges, applies to democratic governments as to dictatorships. The British judges declined even to recognize an international exemption for sitting heads of state (though the Law Lords agreed that Britain's own law would not authorize such a prosecution).

If the Pinochet ruling is good law, it would seem that almost any country in the world now can seek to impose criminal liability on officials from almost any other country in the world, so long as the prosecuting state can get its hands on the officials it wants to try. And it is up to all other countries to decide whether they want to make an arrest on a hapless official visitor and extradite him, without warning, to a state that wants to mount such a trial. The United States has, in fact, ratified the torture convention, which can now be cited (on the Pinochet precedent) as consent to have American state governors, for example, arrested in foreign countries which wish to try them for abuses in their state prison systems. What British courts have read into the torture convention, others may read into other human rights standards. Or it can can be argued that we are bound by emerging standards of customary international law, even when derived from conventions we have not ratified or ratified with reservations and other countries may try to enforce these standards with their own prosecutions of any American suspect they get hold of. At the least, there is no longer any clear international understanding that such prosecutions will violate international law.

Advocates for the ICC say the threat of such unilateral actions by national prosecutors in 150 countries is a strong reason to establish a centralized international authority to control such prosecutions. But the fact is that the Rome Statute does not assert exclusive jurisdiction for the ICC. It says nothing at all about the propriety of unilateral prosecutions by countries that just want to do justice on their own -- to some other country's officials. To the contrary, the Statute says that the ICC will only prosecute if other countries have failed to take action. And advocates of the ICC insist that it will not have to take action very often because the normal recourse will be trial by national courts. Why not the national courts of outside states, as in the Pinochet case?

If the ICC does become established, it will lend even more weight to ad hoc, unilateral prosecutions by other countries. At least, it has the potential to do so. It may give the highest international authority to the claim that some disputed practice is actually a "war crime" or a "crime against humanity" or a "crime of aggression" or even "genocide."

By its terms, the ICC will only have jurisdiction over nationals of countries that ratify the Rome Statute -- except for those who commit "war crimes" against a signatory state. So if the U.S. does not ratify the Rome Statute, U.S. officials could not be prosecuted before the ICC, itself, for

human rights abuses against Americans. But a serious danger is that the ICC, in prosecuting nationals of other countries, will lend credibility and legal authority to similar prosecutions by individual countries, operating through their own national courts -- and these can be turned against Americans. Putting the Pinochet precedent together with an established ICC may prove a rather potent force for expanding the reach of international criminal law.

III. International justice will be hostile to American democracy

Would international prosecutions really be turned against Americans or against our friends? There are several reasons to think so.

To begin with, international human rights advocacy has always displayed a compulsive eagerness to find fault with democracies in order to balance criticism of more repressive governments. Amnesty International, for example, took the lead in mobilizing public opinion in Britain (and elsewhere) for the prosecution of Pinochet -- despite the fact that the democratic government of Chile urged Britain to release Pinochet. AI also urged the Yugoslav War Crimes Tribunal to prosecute NATO officials for what it characterized as "war crimes" in the Kosovo bombing campaign. These were hardly anomalous stances. AI's 1999 Annual Report offers twice as much criticism of human rights practices in Australia as in North Korea, four times as much criticism of the U.S.A. as of communist Cuba, seven times as much criticism of Israel as of Syria. (See *IPA Review*, Melbourne, Australia, Sept. 1999 for a more detailed analysis.)

One reason for this sort of imbalance is that human rights advocates strive to demonstrate impartiality by finding fault on all sides. Another reason is that they have readier access to information about democratic governments than they have about dictatorships. But it is also true that the primary audience for human rights campaigners is in western countries. It is in those countries where they derive their financial support and their primary media attention. And they cater to constituencies eager to use the rhetoric of human rights to attack their own governments on policy matters they disagree with. So we have had the European Court of Human Rights solemnly informing Ireland that it must change its laws on abortion and recently telling the United Kingdom that it must drop its ban on homosexuals in its armed forces. Meanwhile, the UN Human Rights Committee has declared that American capital punishment statutes violate international human rights standards -- even though the U.S. made an explicit reservation regarding capital punishment when it ratified the Covenant on Civil and Political Rights.

The International Criminal Court will have no real power to compel countries to cooperate with it. It will therefore have to rely on the mobilizing efforts of human rights advocacy groups. It will, in all likelihood, pay close attention to the priorities and concerns of these groups just as UN environmental programs attend closely to the concerns of environmental NGOs, which mobilize public opinion for their efforts.

Even some western governments may want to see the United States threatened -- if only a bit -- by international prosecutions. At the Rome conference, American delegates repeatedly expressed willingness to support an international criminal court if its prosecutions were made subject to Security Council approval. This would have exempted the U.S. from any danger that its servicemen would be subject to international prosecutions for alleged abuses committed in peacekeeping operations. This proposal seems to have won almost no support. Opponents insisted it would send an unacceptable signal to provide exemptions for the great powers. But won't it will send an even better signal to launch a prosecution against an American official?

Finally, we should not take very seriously the idea that an international prosecutor will be restrained by the moderating influences of the western countries. At the Rome conference, itself, Arab countries maneuvered to include, among the definitions of "crimes against humanity" the

willful destruction of houses -- because this is a common Israeli form of retaliation for terrorist attacks. The Israeli ambassador to the conference pleaded with the delegates not to do this. He was, himself, as he told them, a survivor of the Nazi genocide that actually launched the concept of "crimes against humanity." Surely, he protested, it was indecent to compare Israeli security policy with the Nazi genocide. His pleas fell on deaf ears. If it is convenient for European governments to conciliate Arab opinion in setting up the tribunal, will it be less convenient to conciliate Arab opinion with a few dramatic prosecutions by the ICC?

IV. Conclusion: A Prudent Warning

Some people will say that the "American Servicemen's Protection Act" is merely a petulant gesture. The ICC may yet be improved. It may never prosecute an American. Why not wait until an American is actually threatened, before deciding how to respond?

I would give two answers. First, the establishment of the ICC will itself add momentum to a larger trend. It is in our interest to reverse that larger trend. We should try to stop the ICC from coming into existence or at least make clear that it is not an important authority for shaping international law. Whether the ICC does come into existence, and with what level of support and credibility, is still somewhat uncertain. If we can discourage other countries from ratifying the Rome Statute, by proclaiming our refusal to cooperate with it, we will have achieved something quite worthwhile.

Second, we should remember that these prosecutions are likely to operate in a twilight zone of bluff and dodge. In the end, Britain allowed Pinochet to return to Chile with the excuse that he was too sick to stand trial. Human rights groups, though expressing frustration at the immediate result, still insisted that an important point had been made. The prosecutors in the Yugoslav tribunal did not dare to charge war crimes against NATO but they went through the motions of investigating to make a formal point.

It is very easy to imagine this sort of game played out against Americans or Israelis or other American friends who happen to be in disfavor with "international opinion." Those who set out on such a prosecution may even think it worthwhile to test whether public opinion in the United States can be roused to restrain the American government from reacting too forcefully to the arrest of some particular American servicemen or official. The American government might feel a bit intimidated by "world opinion" or "international law" -- or at least, other countries might hope for such an outcome, when they arrest an American official or servicemen.

In this setting, it is much to our interest to dispel ambiguity in advance. We should tell the world quite openly that we will not stand for the arrest of an American -- or a counterpart from one of our allies -- simply because the arrest is justified with the encompassing rhetoric of international human rights protection. Other countries may want to share their sovereignty with an international criminal court. We should make it clear in advance that we would regard such action as an extremely hostile act against the sovereign rights of the United States. We should make it clear that we will defend our own sovereignty, whatever other countries may do.